Supreme Court, U.S.
FILED

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CASE NO.

IN THE UNITED STATES SUPREME COURT

October Term 1999

THE STATE OF FLORIDA,
Petitioner,

- **vs.**

JEFF WILSON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA FOURTH DISTRICT

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37 pp

QUESTION PRESENTED

Are the generalized safety concerns arising from a lawful traffic stop of *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) and *Maryland v. Wilson*, 519 U.S. 408 (1997), sufficient to authorize a police officer to order any passenger in a vehicle to return to the vehicle or reenter the vehicle for the duration of the traffic stop?

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CASE NO.
IN THE UNITED STATES SUPREME COURT
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THE STATE OF FLORIDA,
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JEFF WILSON,
Respondent.

OPINIONS BELOW

The decision from which Petitioner seeks to invoke the discretionary review of this Court is reported at *Wilson v. State*, 734 So.2d 1107 (Fla.4th DCA 1999). [A-2].[1] The order of the Supreme Court of Florida, declining jurisdiction is not reported. [A-1]. The trial court's order denying the motion of Respondent, Jeff Wilson, to suppress the evidence is not reported. [A-12].

JURISDICTION

The Supreme Court of Florida's order declining jurisdiction was rendered on December 8, 1999. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). The District Court of Appeal of Florida, Fourth District's decision was rendered with an opinion and thus the Supreme Court of Florida had jurisdiction to hear the cause. The order declining jurisdiction by the Supreme Court of Florida was the final decree rendered by the highest court of the State of Florida in which a decision herein could be had. Art., V, Sec.3(b)(3), Fla. Const. *The Florida Star v. B.J.F.*, 530 So.2d 286 (Fla. 1988).

[1] The symbol "A" followed by the appropriate number represents a citation to the materials contained in the Appendix to this pleading.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV, United States Constitution, provides, in pertinent part:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause...

Amendment XIV, §I, United States Constitution, provides, in pertinent part:

> ...nor shall any state deprive any person of life, liberty, or property, without due process of law...

Article I, § 12, Florida Constitution, provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the communication to be intercepted, and the nature of the evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court

construing the 4th Amendment to the United States Constitution.

STATEMENT OF THE CASE AND FACTS

Respondent, Jeff Wilson, was the Appellant in the District Court of Appeal of Florida, Fourth District. The facts of the case were established at the evidentiary hearing held by the trial court on Respondent's motion to suppress cocaine, marijuana and drug paraphernalia. [A-3]. The parties stipulated to admission of the arresting officer's probable cause affidavit and his deposition testimony. [A-3].

The evidence established that Deputy Sean Murray of the Palm Beach County Sheriff's Office was on patrol on July 6, 1997, when he observed a Ford Escort traveling above the speed limit in the northbound lane on Military Trail. A check of the license tag revealed it was registered to a Chevy pick-up truck. Deputy Murray activated his emergency lights to stop the Ford Escort just as it turned into the parking lot of the Getaway Bar. The deputy parked behind the Escort, exited his patrol car and approached the driver's side of the Escort. Respondent, who was a passenger in the Escort, opened his door and exited the car, walking towards the Getaway Bar, five or ten feet away. Deputy Murray stopped Respondent from entering the bar and instructed him to return to the vehicle and remain inside until the traffic stop was completed. Respondent complied with his instructions. [A-3]

Deputy Murray ordered Respondent to return to the car and remain there for safety concerns. The officer expressed concern for his own safety because of the bar's unsavory reputation for shootings and other violent incidents among its patrons. Murray acknowledged that he had no reason to suspect the passenger of committing a crime or possessing any weapons or contraband. However, he said his personal standard procedure as to traffic stops was to require all occupants to remain inside the vehicle until he concluded the stop. [A-3].

After Respondent reentered the vehicle, Deputy Murray returned his attention to the driver. He noticed that the driver appeared to be extremely nervous and that the man's hands were shaking uncontrollably. He also saw the driver attempting to conceal

something under the driver's seat of the car. The deputy then removed the driver from the vehicle and, during a pat down for weapons, found none. After the driver failed to provide a driver's license, Officer Murray arrested him for driving without a license and placed him in the patrol car. The deputy then headed back toward the Escort to obtain more vehicle information. As he approached the vehicle, Deputy Murray saw Respondent trying to conceal something in the floorboard area. Looking through the passenger window, the deputy observed a brown drug pipe containing what he believed was marijuana on the floorboard beside Respondent's feet. Respondent was ordered out of the vehicle and, after he made a furtive movement; a pat down for weapons was made. Although no weapons were discovered, the deputy detected an odor of marijuana on Respondent's person. He searched Respondent and found a small plastic baggie containing cocaine. Respondent was placed under arrest and charged with possession of cocaine, possession of marijuana and possession of drug paraphernalia. [A-4].

The trial court denied the motion to suppress finding that the initial traffic stop was lawful. The court further held that when the deputy ordered Respondent to return to the vehicle and remain there for the duration of the stop, the request did not constitute an unreasonable seizure under the Fourth Amendment. [A-4]. Respondent then pled nolo contendere, reserving the right to appeal the denial of his motion to suppress. [A-3].

The district court reversed the trial court's denial of the motion to suppress in *Wilson v. State*, 734 So.2d 1107 (Fla. 4th DCA 1999). The reversal was predicated on the belief that Respondent was unlawfully detained when he was ordered back into the vehicle until the completion of the traffic stop. The district court found that the detention was unlawful since the deputy did not have particularized reasonable suspicion that Respondent was about to commit a crime or possessed a weapon or contraband. [A-10].

In rejecting the State's position that this Court's decisions in *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977), and *Maryland v. Wilson*, 519 U.S. 408, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997), authorized Respondent's detention until the traffic

stop was completed, the court did recognize that these cases establish the rule that, during a lawful traffic stop a police officer may, based on the officer's general concern for his safety, order both the driver and passenger out of the vehicle. The court, which had previously held in *Borski v. State*, 712 So.2d 787 (Fla. 4th DCA 1998), that *Mimms* and *Wilson* authorized a officer to direct the driver to return to his vehicle for the remainder of a lawful traffic stop, refused to extend the holding to passengers. [A-5-7].

The district court acknowledged that this Court in *Wilson* deemed any intrusion of asking a driver and passenger to step outside a stopped vehicle to be "*de minimis* " when balanced against the interest of police safety. The Court balanced this result in favor of the police because of statistical data that a high percentage of police assaults and homicides occur during traffic stops. The risk of assaults and fatalities would be significantly reduced by ordering occupants outside the vehicle. [A-8]. The district court then found that since no empirical data was offered in *Wilson*, that justified the ordering of passengers back inside vehicles for safety purposes, general safety concerns were insignificant enough to order a passenger to return to the vehicle for the duration of a traffic stop. [A-8].

Further, the district court held that a command preventing a passenger from leaving the scene of a traffic stop to continue on his independent way is a greater intrusion upon personal liberty than an order simply directing a passenger out of the vehicle. The court found that such an arbitrary interference with the freedom of movement of one who is not suspected of any illegal activity could not be classified as a *de minimis* intrusion. [A-9-10].

In balancing the safety interest in ordering a passenger to return to the vehicle against the interference with the passenger's freedom of movement, the district court held that the balance was in the passenger's favor. The district court found that a wholly innocent passenger should have the right to choose whether to continue on with his business or return to the vehicle and remain by his driver's side. [A-9].

In summary, the court held that an officer's generalized safety concern arising from a lawful traffic stop is insufficient to authorize the officer to order the passenger to return to the vehicle until the completion of the traffic stop. Rather, for the detention to be lawful, the officer must have an articulable founded suspicion of criminal activity or a reasonable belief that the passenger poses a threat to the safety of the officer or others before ordering the passenger to return to and remain in the vehicle. The district court reversed the trial court's order denying Respondent's motion to suppress. [A-9-10].

Petitioner then sought discretionary conflict review with the Supreme Court of Florida. On December 8, 1999, the Supreme Court of Florida declined to accept jurisdiction. [A-1].

REASON FOR GRANTING THE WRIT

THE DECISION OF THE COURT BELOW THAT AN OFFICER'S GENERALIZED SAFETY CONCERNS ARISING FROM A LAWFUL TRAFFIC STOP IS INSUFFICIENT TO AUTHORIZE THE OFFICER TO ORDER THE PASSENGER, WHO VOLUNTARILY EXITED THE VEHICLE, TO RETURN TO THE VEHICLE OR TO REENTER THE VEHICLE UNTIL THE COMPLETION OF THE TRAFFIC STOP CONFLICTS WITH DECISIONS OF THIS COURT, DECISIONS OF UNITED STATES COURTS OF APPEAL AND DECISIONS OF APPELLATE COURTS OF THE OTHER STATES.

In this case, Respondent was a passenger in a speeding Ford Escort with a license tag registered to another vehicle. Deputy Murray activated his emergency lights to stop the Escort just as it turned into the parking lot of the Getaway Bar. The deputy parked behind the Escort, exited his patrol car and approached the driver's side of the Escort. At that time, Respondent voluntarily exited the vehicle and started walking towards the Getaway Bar, five or ten feet away. Deputy Murray stopped Respondent from entering the bar and, based on generalized safety concerns, instructed him to return to and remain inside the vehicle until the traffic stop was completed. Respondent complied with his instructions. While Respondent was seated in the vehicle, his subsequent conduct provided reasonable suspicion to support a *Terry*[2] stop and frisk, which uncovered cocaine, marijuana and drug paraphernalia.

Based on the foregoing, the District Court of Appeal of Florida, Fourth District held that Respondent was illegally detained when he was ordered back into the lawfully stopped vehicle. The

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[2] *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

court found the general safety concerns that arise during a lawful traffic stop which authorize a police officer to order both the driver and passenger out of a vehicle, does not extend to ordering a passenger to remain at or reenter the stopped vehicle. The Fourth District found support for this holding in *Maryland v. Wilson*, 519 U.S. 408, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997), where the Court held that during a lawful traffic stop, generalized safety concerns allow an officer to order a passenger out of the vehicle. The Florida court opined that an officer no longer has a safety concern regarding the passenger once the passenger exits and walks away from the vehicle. Thus, the court held that an officer must have an articulable founded suspicion of criminal activity or a reasonable belief that the passenger poses a threat to the safety of the officer or others before he can order the passenger to return to and remain in the vehicle.

The Florida court's holding misapprehends *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977), and *Maryland v. Wilson*, 519 U.S. 408, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997), and erroneously answers the question left unanswered in *Wilson*, to wit: whether an officer may forcibly detain a passenger for the entire duration of the stop. *Id.* at 415 n.3, 117 S.Ct. at 886 n.3.

In *Mimms*, the Court established that a police officer, may routinely, order the driver of a vehicle lawfully stopped for a traffic violation to exit his vehicle. This holding was based on standard Fourth Amendment analysis which determines the reasonableness of a particular governmental invasion of a citizen's personal security by balancing the public interest against the individual's right to personal security free from arbitrary interference by law enforcement officers. On the public interest side of the equation, the Court noted that the State "freely concede[d]" that there had been nothing unusual or suspicious to justify ordering Mimms out of the car, but that it was the officer's "practice to order all drivers [stopped in traffic stops] out of their vehicles as a matter of course" as a "precautionary measure" to protect the officer's safety. *Id.* at 109-110, 98 S.Ct. at 332-333. The Court thought it "too plain for argument" that this justification--officer safety--was "both legitimate and weighty." *Id.* at 110, 98 S.Ct. at 333. In addition, the Court observed that the danger to the officer of

standing by the driver's door and in the path of oncoming traffic might also be "appreciable." *Id.* at 111, 98 S.Ct. at 333.

On the other side of the equation, the Court considered the intrusion into the driver's liberty occasioned by the officer's ordering him out of the car. Noting that the driver's car was already validly stopped for a traffic infraction, the Court observed that the additional intrusion of asking him to step outside his car was "*de minimis.*" *Id.* at 111, 98 S.Ct. at 333. Accordingly, the Court concluded that "once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable seizures." *Id.* at 111, n. 6, 98 S.Ct. at 333, n.6.

In *Maryland v. Wilson*, the Court applied *Mimms* to passengers. On the public interest side, the Court found the same weighty interest in an officer's safety is present regardless of whether the occupant of the stopped car is a driver or passenger. In the case of passengers, the danger of the officer's standing in the path of oncoming traffic is not as likely, except in the case of a passenger in the left rear seat, however the fact that there might be more than one occupant of the vehicle increases the possible sources of harm to the officer.

As to personal liberty, the Court found that the case for the passengers is in one sense stronger than that for the driver. There is probable cause to believe that the driver has committed a minor vehicular offense, but there is no such reason to stop or detain the passengers. The Court found as a practical matter however, the passengers are already stopped by virtue of the stop of the vehicle and the only change in their circumstances which could result from ordering them out of the car is that they would be outside of, rather than inside of, the stopped car. By ordering the passenger outside the car, the Court concluded, the passengers will be denied access to any possible weapon that might be concealed in the interior of the passenger compartment. The Court recognized that the possibility of a violent encounter stems not from the ordinary reaction of a motorist stopped for a speeding violation, but from the fact that evidence of a more serious crime might be uncovered during the stop and thus the

motivation of a passenger, to employ violence to prevent apprehension of such a crime, is every bit as great as that of the driver.

The Court then held that the danger to an officer from a traffic stop is likely to be greater when there are passengers in addition to the driver in the stopped car, and therefore, the additional intrusion on the passenger is minimal. The Court held that an officer making a traffic stop may order passengers to get out of the car pending completion of the stop. Further, it is self-evident that, under the aforenoted cases, once the officer has control of the circumstances, the officer's control extends to all the circumstances attending passenger's who are also present during the traffic stop. The Florida court, however, found that the intrusion on the passenger's personal liberty when ordered to reenter the vehicle outweighed the public interest of police officer safety.

Authorizing the police to determine how to best proceed with a traffic stop, including when passengers are present, will minimize the risk of harm to both the police and the cars occupants.[3] This position is consistent with the Court's recent opinion in *Illinois v. Wardlow*, 120 S.Ct. 673 (2000). In *Wardlow*, the Court held that unprovoked flight from a police officer may, under the totality of the circumstances, support reasonable suspicion to justify a stop. The Court found that "[h]eadlong flight–wherever it occurs–is the consummate act of evasion: it is not necessarily indicative of wrongdoing, but it is certainly suggestive of such." *Id.* at 676. In holding unprovoked flight from police is a circumstance which can support reasonable suspicion, the Court found it was consistent with its decision in *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 299 (1983), where the Court held that during a consensual

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[3] If the officer keeps all the occupants in or at the car until the stop is concluded, the officer's attention will be undivided and the officer will be better prepared for all exigencies. If passengers are allowed to exit the vehicle and leave the scene before the stop is concluded, the officer's risk of harm increases because the officer's attention will be divided between the driver of the vehicle and the passenger who, outside the officer's field of vision, could easily draw a weapon and shoot the officer or cause other untoward results.

encounter an individual does not have to cooperate with the police and can, after the contact, go about his business. The court then held:

> [U]nprovoked flight is simply not a mere refusal to cooperate. Flight by its very nature, is not "going about one's business"; in fact, it is just the opposite. Allowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual's right to go about his business or to stay put and remain silent in the face of police questioning.

Id. at 676.

In light of the public interest of police officer safety during a lawful traffic stop, ordering the passenger to remain in or at the vehicle is, just like ordering him out of the vehicle, a *de minimis* intrusion on his personal liberty. Lest we forget, there is no question that in this situation the traffic stop is lawful and that one of many primary functions of the police is to investigate and stop criminal conduct while maintaining the safety of the public at large. The intrusion to any passenger is minimal because it can only last until the traffic stop is concluded. Once concluded, if the police have not learned facts rising to the level of reasonable suspicion concerning the passenger's circumstances, the passenger is free to go on, whether in the vehicle or otherwise.

The extension of *Mimms* and *Wilson* to authorize police officers to order a passenger to reenter or remain at the vehicle is in accordance with the policy announced in *Michigan v. Summers*, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981). In *Summers*, the question was whether the officers had the authority to require Summers to reenter the house and to remain there while they conducted their search. In holding that the officers had the authority, the Court said:

> Although no special danger to the police is suggested by the evidence in this record, the execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or

> frantic efforts to conceal or destroy evidence. The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation.

Id. at 702-703. (footnote omitted).

This risk of danger is the same during traffic stops.

The instant holding also directly conflicts with decisions of the majority of jurisdictions that have addressed the question. *See*: *Rogala v. District of Columbia*, 161 F.3d 44 (D.C. Cir. 1998); *United States v. Moorefield*, 111 F.3d 10 (3rd Cir. 1997); *Tawdul v. State*, 720 N.E.2d 121 (Ind. Ct. App. 1999); *People v. Gonzalez*, 704 N.E.2d 375 (Ill. 1998); *Harris v. Commonwealth*, 500 S.E.2d 257 (Va. Ct. App. 1998); *Carter v. State*, 494 S.E.2d 108 (Ga. Ct. App. 1997); *State v. Roberts*, 943 P.2d 1249 (Mont. 1997); *State v. Webster*, 824 P.2d 768 (Ariz. Ct. App. 1991).

For example in *United States v. Moorefield*, 111 F.3d 10 (3rd Cir. 1997), the *Moorefield* court to held that an officer can lawfully order a passenger to remain in a vehicle with his hands in the air until the completion of the traffic stop.

> The only change in Moorefield's circumstances resulting from the order to remain in the car and put his hands in the air, was that he remained inside of the stopped car with his hands in view, rather than inside of the stopped car with his hands lowered into a passenger compartment that could potentially contain a concealed weapon. Just as the Court in *Wilson* found ordering a passenger out of the car to be a minimal intrusion on personal liberty, we find the imposition of having to remain in the car with raised hands equally minimal. We conclude that the benefit of added officer protection outweighs the minor intrusion.

Id. at 13.

In *Carter v. State*, 494 S.E.2d 108 (Ga. Ct. App. 1997), the Court on substantially similar facts, held that the police can order a passenger back into the car after he voluntarily exited the vehicle and started walking away. Carter was a passenger in an automobile in which the officer's observed suspicious behavior. After the driver made an illegal turn, the officer executed a traffic stop and, after exiting his vehicle, the officer ordered the driver to shut off his engine. At that point Carter, the front seat passenger, exited the vehicle and began to walk away. The officer ordered Carter to get back in the vehicle. Carter ran into the woods. The officer then chased and eventually caught Carter and then saw cocaine hanging from Carter's pocket. The officer stated that the reason he chased Carter was that he was taught in the police academy that Carter's actions could be a distraction and that he could have circled back and be a safety risk for the officer. Therefore, the officer, based on general safety concerns, detained Carter until he could figure out what was going on. The court found that *Wilson* authorized the officer to order the passenger to re-enter the vehicle.

The Florida court's position, that the Fourth Amendment does not authorize a passenger's detention until the traffic stop is completed, has only been adopted by Maryland in *Dennis v. State*, 693 A.2d 1150 (Md. 1997). Indiana's intermediate appellate court is split on the issue; in *Walls v. State*, 714 N.E.2d 1266 (Ind. Ct. App. 1999), the panel held that the Fourth Amendment does not authorize a passenger's detention until the stop is completed, but see, *Tawdul v. State*, 720 N.E.2d 1211 (Ind. Ct. App. 1999) where the court held that the police may detain a passenger who exits a vehicle after it has been lawfully stopped to ascertain the situation and to alleviate any concerns the officer has for his safety. Two other states, Massachusetts in *Commonwealth v. Gonsalves*, 711 N.E.2d 108 (Mass. 1999) and Washington in *State v. Mendez*, 970 P.2d 722 (Wash. 1999), have ruled that under their respective state constitutions such a detention is unlawful.[4]

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[4] All review by the Supreme Court of Florida of Fourth Amendment issues must be construed in conjunction with case law from this Court. Art. I, Sec 12, Florida Constitution provides that the right afforded by

The District Court's decisions to depart from *Mimms* and *Wilson*, is predicated on an unreasonable and overly niggardly view:

> The Fourth Amendment,...has consistently been interpreted as prohibiting routine and arbitrary seizures. We find that the individual liberty interests at stake here outweigh the generalized safety concerns. There is little or no evidence to support the belief that the typical traffic stop of ordinary citizens gives rise to sudden violence or unruly behavior justifying wholesale seizure of automobile passengers, unsupported by any reasonable suspicion....[I]n those situations requiring an officer to direct a passenger to return to and remain in the vehicle, the officer should be able to identify objective circumstances that support the reasonableness of his order and not rely on standard routine or police protocol.

Wilson v. State, 734 So.2d 1107, 1112-13 (Fla. 4th DCA 1999).

Mimms and *Wilson* authorize a police officer, based on generalized safety concerns of an officer during a traffic stop, to maintain control of the situation until the stop is completed. *Wilson* allows an officer to order a passenger out of the vehicle in order to lessen the likelihood that he will secure a weapon from the passenger compartment and harm the officer. This same policy of officer safety requires that *Wilson* be applied to situations where, like here, the passenger voluntarily exits the vehicle and starts walking away from and out of the sight line of the officer. *Wilson*, clearly recognizes that the safety concerns arise not necessarily from the traffic violation, but from the fact that a more serious crime might be uncovered during the stop is where the passenger walks away from the vehicle. *See Tafero v. State*, 403 So.2d 355, 358-9 (Fla. 1981) (Trooper Black approached

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this provision "shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court." *See Perez v. State*, 620 So.2d 1256 (Fla. 1993).

a parked Camero at a rest stop and ordered Tafero and another male passenger out of the car. Tafero's girlfriend, Sonia Jacobs, fired two shot at the officer, which allowed Tafero time to retrieve a weapon and kill the trooper and a Canadian Mountie who was riding with the trooper). Therefore, when an officer makes a lawful traffic stop, it is reasonable for the officer to undertake those steps necessary to secure the scene, including detaining all passengers to help ensure the officer's and the public's safety.

CONCLUSION

Based on the foregoing reasons, the Petitioner, the State of Florida, respectfully requests that this Court grant its Petition for Writ of Certiorari to the District Court of Appeal of Florida, Fourth District and summarily reverse the District Court based on the authorities herein cited.

Respectfully submitted,
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CASE NO.

IN THE UNITED STATES SUPREME COURT

October Term 1999

THE STATE OF FLORIDA,
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vs.

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PETITION FOR WRIT OF CERTIORARI TO
THE DISTRICT COURT OF APPEAL OF FLORIDA
FOURTH DISTRICT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Order Declining Jurisdiction, *State. v. Wilson*, Supreme Court of Florida, December 8, 1999 ..... A-1

Opinion, *Wilson v. State*, District Court of Appeal of Florida, Fourth District, May 5, 1999 ..... A-2

Order Denying the Motion to Suppress, Circuit Court of the 15th Judicial Circuit of the State of Florida in and for Palm Beach County Dated July 23, 1998 ..... A-12

Supreme Court of Florida

WEDNESDAY, DECEMBER 8, 1999

STATE OF FLORIDA,	*	
	*	
Petitioner,	*	CASE NO. 96,237
	*	
vs.	*	District Court of Appeal,
	*	4th District - No. 98-1736
JEFF WILSON,	*	
	*	
Respondent.	*	
	*	

* * * * * * * * * * * * * * * *

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

SHAW, ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur.

A True Copy
TEST:

Debbie Causseaux
Acting Clerk, Supreme Court

BH

cc: Hon. Marilyn Beuttenmuller, Clerk
Hon. Dorothy H. Wilken, Clerk
Hon. Marvin U. Mounts, Jr., Judge

Mr. Michael Neimand
Ms. Margaret Good
Ms. Mallorye Cunningham

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

JANUARY TERM 1999

JEFF WILSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 98-1736

Opinion filed May 5, 1999

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Marvin U. Mounts, Jr., Judge; L.T. Case No. 97-007412CF A02.

Richard L. Jorandby, Public Defender, and Mallorye Cunningham, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Maya Saxena, Assistant Attorney General, Fort Lauderdale, for appellee.

TAYLOR, J.

In this appeal we consider the question whether a police officer conducting a lawful traffic stop may lawfully order a passenger, who has left the stopped vehicle, to return to and remain in the vehicle for the duration of the stop, absent a reasonable suspicion of criminal

activity or belief that the passenger poses a threat to the officer's safety.

Jeff Wilson entered a nolo contendere plea to possession of cocaine, possession of marijuana less than 20 grams, and possession of drug paraphernalia, reserving the right to appeal the denial of his motion to suppress. Because we find that the deputy was not justified in detaining the appellant, for investigative or safety purposes, during the traffic stop, we reverse the denial of his motion to suppress evidence.

At the hearing on the motion to suppress, neither the state nor the defendant presented any live testimony. Instead, they stipulated to admission of the arresting officer's probable cause affidavit and his deposition testimony. According to this evidence, Deputy Sean Murray of the Palm Beach County Sheriff's Office was on patrol on July 6, 1997, when he observed a Ford Escort traveling above the speed limit in the northbound lane on Military Trail. He checked the tag and discovered that the tag was registered to a Chevy pick-up truck. Deputy Murray activated his emergency lights to stop the Ford Escort just as it turned into the parking lot of the Getaway Bar. The deputy parked behind the Escort, exited his patrol car and approached the driver's side of the Escort. The appellant, who was a passenger in the Escort, opened his door and started walking towards the Getaway Bar, which was only five or ten feet away. Deputy Murray stopped the passenger from entering the bar and instructed him to return to the vehicle and remain inside until the traffic stop was completed. The passenger complied with his instructions.

Deputy Murray explained that he instructed the passenger to return to the car and remain there for safety concerns. The officer expressed concern for his own safety because of the bar's unsavory reputation for shootings and other violent incidents among its patrons. Murray acknowledged that he had no reason to suspect the passenger of committing a crime or possessing any weapons or contraband. However, he said his personal standard procedure on traffic stops was

to require all occupants to remain inside the vehicle until he concluded the stop.[5]

After the passenger re-entered the vehicle, Deputy Murray returned his attention to the driver. He noticed that the driver appeared to be extremely nervous and that his hands were shaking uncontrollably. He also observed the driver attempting to conceal something under the driver's seat of the car. At that point, the deputy removed the driver from the vehicle and patted him down. No weapons were discovered. Deputy Murray asked the driver for his driver's license. The driver responded that he did not have one. Whereupon, the deputy arrested the driver for driving without a license and placed him in the back seat of his patrol car. After placing the driver in his vehicle, the deputy headed back toward the Escort to obtain more vehicle information. As he approached the vehicle, Deputy Murray noticed the passenger trying to conceal something in the floorboard area. Peering through the passenger window, the deputy observed a brown drug pipe containing what he believed was marijuana on the floorboard beside the passenger's feet. He ordered the passenger out of the vehicle. While standing outside the vehicle, the passenger made a furtive movement as if he were trying to conceal something on his right side. The deputy patted him down for weapons. Although he did not discover any weapons, the deputy detected an odor of marijuana on the passenger's person. He searched the passenger and found a small plastic baggie containing cocaine. The deputy placed the passenger under arrest and charged him with possession of cocaine, possession of marijuana and possession of drug paraphernalia.

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[5] There was conflict between the officer's sworn statement in his probable cause affidavit that he "instructed the passenger ... to immediately return to the vehicle" and his deposition testimony that he merely "requested" the passenger to do so and that the passenger voluntarily complied with his request. The state below argued that there was no "seizure" but a consensual encounter. However, in ruling on the suppression motion, the trial judge concluded that the officer ordered the passenger to return to and remain in the vehicle. On appeal, the state did not dispute appellant's characterization of the officer's actions as an "order" and apparently abandoned its position that no seizure occurred.

Appellant moved to suppress the evidence. He did not contest the lawfulness of the initial traffic stop; he argued that the deputy's ordering him to return to the vehicle and remain there for the duration of the stop constituted an unreasonable seizure under the Fourth Amendment. He contends that the trial court erred in denying his motion to suppress the evidence seized as a result of his unlawful detention.

We first observe that a trial court's ruling on a motion to suppress is clothed with a presumption of correctness and we must interpret the evidence and reasonable inferences derived therefrom in a manner most favorable to sustaining the trial court's ruling. *See Rolling v. State*, 695 So. 2d 278, 291 (Fla.), *cert. denied*, 118 S. Ct. 448 (1997); *Johnson v. State*, 438 So. 2d 774 (Fla. 1983)(citing *McNamara v. State*, 357 So. 2d 410 (Fla. 1978)).

To justify a temporary detention of an individual, a law enforcement officer must have a founded suspicion of criminal activity. *Moore v. State*, 584 So. 2d 1122, 1123 (Fla. 4th DCA 1991); *State v. Stevens*, 354 So. 2d 1244 (Fla. 4th DCA 1978); § 901.151, Fla. Stat. (1997). A founded suspicion is one which has a factual foundation in the circumstances observed by the law enforcement officer, interpreted in light of the officer's knowledge and experience, indicating that the person detained either had committed, was committing or about to commit a crime. *Bryant v. State*, 577 So. 2d 1372, 1374 (Fla. 1st DCA 1991).

At the hearing on the motion to suppress, the officer's deposition testimony revealed that he did not suspect the passenger of any criminal activity at the time he instructed him to return to the vehicle. The officer conceded that there was nothing unusual or suspicious about the passenger's behavior, but that it was simply his routine practice during traffic stops to request occupants to remain in the vehicle. Based on the officer's own testimony, we can conclude that he did not have the requisite founded suspicion of criminal activity for the stop. *See Aguila v. State*, 567 So. 2d 1007 (Fla. 3d DCA 1990).

The state argues that, notwithstanding the absence of a founded suspicion for the passenger's detention, the deputy was justified in ordering the passenger to return to and remain in the vehicle to facilitate officer safety. In support of its position, the state analyzes the evolution of a series of automobile stop cases, whose constitutional principles, it contends, permit the police procedure utilized in this case. The state begins its analysis with *Doctor v. State*, 573 So. 2d 157 (Fla. 4th DCA 1991), *approved in part, quashed in part*, 596 So. 2d 442 (Fla. 1992), wherein this court held that "when a police officer lawfully stops a car for a traffic infraction, his order to the driver or passenger to get out of the car is reasonable and permissible under the Fourth Amendment even though at the time of the stop the officer has no reason to suspect foul play from the particular driver or passenger." We explained in *Doctor* that:

> An officer's interest in protecting himself or a fellow officer against an unsuspected assault by a driver or passenger and against accidental injury from passing traffic is both legitimate and weighty and the intrusion into the driver's or passenger's personal liberty is de minimis. *See Pennsylvania v. Mimms*, 434 U.S. 106, 109-11, 98 S.Ct. 330, 332-33, 54 L.Ed.2d 331, 336-37 (1977).

Id. at 159.

Mimms set forth a "bright line" rule allowing officers to order a lawfully stopped driver from the vehicle. The Supreme Court reached its conclusion after balancing the public interest in allowing this practice against the driver's right to personal security free from arbitrary interference by law enforcement. The Court reasoned that once the driver is already lawfully stopped, the incremental intrusion in requiring the driver to be detained outside the vehicle "can only be described as *de minimis*." *Mimms*, 434 U.S. at 111. Balanced against this "mere inconvenience" is the "legitimate and weighty" interest in protecting the officer's safety against criminal attacks. *Id.* at 110.

In *Maryland v. Wilson*, 117 S. Ct. 882 (1997), the Supreme Court extended the above rationale to passengers and held that a police

officer may, as a matter of course, order the passengers in a lawfully stopped vehicle to exit the vehicle pending completion of the stop. The Court recalled its balancing analysis under the Fourth Amendment in the *Mimms* decision and noted that "[o]n the public interest side of the balance, the same weighty interest in officer safety is present regardless of whether the occupant of the stopped car is a driver or passenger." *Id.* at 885. Citing statistics, the Court noted that in 1994 alone, there were 5,762 officer assaults and 11 officers killed during traffic pursuits and stops. *Id.* The Court observed, however, that one significant safety factor in *Mimms* was absent in *Wilson:* the danger to the officer of standing by the driver's door and in the path of oncoming traffic. Yet, the Court added, the "fact that there is more than one occupant of the vehicle increases the possible sources of harm to the officer." *Id.* at 885. A primary concern highlighted in *Wilson* was a passenger's access to weapons:

> Outside the car, the passengers will be denied access to any possible weapon that might be concealed in the interior of the passenger compartment. It would seem that the possibility of a violent encounter stems not from the ordinary reaction of a motorist stopped or a speeding violation, but from the fact that evidence of a more serious crime might be uncovered during the stop. And the motivation of a passenger to employ violence to prevent apprehension of such a crime is every bit as great as that of the driver.

Id. at 886.

This court recently applied *Mimms* and *Wilson* in upholding the validity of a police officer's directive to a driver to return to his vehicle for the remainder of a lawful traffic stop. *See Borski v. State*, 712 So. 2d 787 (Fla. 4th DCA 1998). In *Borski*, we determined that the "personal liberty versus officer safety" balancing analysis in *Mimms* and *Wilson* applied with equal force to such a command to a driver.

We now have before us the separate question whether a passenger can be ordered to return to and remain in the vehicle while the police complete a traffic stop. We must, therefore, decide if we

should extend our ruling in *Borski* to passengers as well as to drivers. This case, in contrast to *Borski*, raises a separate and significant issue concerning the authority of a police officer to make a seizure of someone who is not suspected of any violation of the law and who does not pose an articulable suspicion of danger to officer safety. As the Supreme Court explained in *Mimms, supra*, "the touchstone of our analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security'," *Mimms*, 434 U.S. at 108-109 (quoting *Terry v. Ohio*, 392 U.S. 1, 19 (1968)), and the reasonableness "depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers'," *id.* at 109 (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 95 S. Ct. 2574, 45 L. Ed. 2d 667 (1975)).

In *Wilson*, the Supreme Court deemed the intrusion of asking a driver and passenger to step outside a stopped vehicle to be "*de minimis*" when balanced against the interest of police safety. As mentioned above, the Court presented statistical data on the high percentage of police assaults and homicides that occur during traffic stops and suggested that the risk of assaults and fatalities would be significantly reduced by ordering occupants *outside* the vehicle.

Logic and a reasonable interpretation of *Wilson* would suggest, then, that a principal risk mentioned therein, i.e., passenger access to weapons potentially concealed inside a car, would be increased if passengers were forced back *inside* the vehicle. No empirical data was offered in *Wilson* as justification for ordering passengers back *inside* the vehicle for safety purposes. In fact, the Supreme Court expressly declined the State of Maryland's invitation to "hold that an officer may forcibly detain a passenger for the entire duration of the stop." *Wilson*, 117 S. Ct. at 886 n.3.

On the personal liberty side of the scale, the Supreme Court pointed out that as a practical matter, passengers are already stopped by virtue of the stop of the vehicle, so that the additional intrusion of ordering them out of the vehicle is minimal. *Id.* at 866. However, in our view, a command preventing an innocent passenger from leaving the scene of a traffic stop to continue on his independent way is a

greater intrusion upon personal liberty than an order simply directing a passenger out of the vehicle. Such an arbitrary interference with the freedom of movement of one who is not suspected of any illegal activity whatsoever cannot be classified as a *de minimis* intrusion.

We have no difficulty determining, as we did in *Doctor* and *Borski*, that the traffic violation sufficiently justifies subjecting the driver to detention -- in or outside the vehicle. There is a legitimate need for adequate police control over the traffic violator for the time necessary to conclude the business of the stop. The restraint on the liberty of the blameless passenger is, in contrast, an unreasonable interference. As Justice Stevens said in his dissent in *Maryland v Wilson*, "[t]he Constitution should not be read to permit law enforcement officers to order innocent passengers about simply because they have the misfortune to be seated in a car whose driver has committed a minor traffic offense." *Wilson* at 889. A wholly innocent passenger should have the right to choose whether to continue on with his business or return to the vehicle and remain by his driver-companion's side.

In a case that involved a seizure issue similar to ours, *Dennis v. State*, 345 Md. 649, 693 A.2d 1150 (1997), a passenger in a lawfully stopped vehicle ignored a police command to remain in the vehicle, and instead, walked away from the scene and subsequently resisted police attempts to detain him. His conviction of disorderly conduct and battery was reversed by Maryland's highest appellate court, which, upon remand from the United States Supreme Court, reaffirmed its prior holding that there was no valid detention. *Dennis* held that a police officer could not legally detain a passenger simply for the general purpose of officer safety; detention required at least an articulated reasonable suspicion that the passenger was engaged in activity justifying a *Terry* stop. Further, the Maryland court found it significant that there was no explanation why it was safer for the officer to detain the passenger than allow him to walk away from the scene. We note that some jurisdictions have reached a contrary result and permitted routine orders to passengers to remain inside the vehicle. *See, e.g., State v. Webster*, 824 P.2d 768, 770 (Ariz. Ct. App. 1992).

In the instant case, the officer expressed a generalized safety concern because of the location of the traffic stop, i.e. the parking lot of a bar known for rowdy patrons, but he could not articulate any facts attributable to the appellant's behavior or appearance that created a suspicion of illegal activity or danger to his safety. Appellant had already left the vehicle and was about to enter the bar when he was ordered back to the car and told to get inside. He did nothing to warrant this restriction on his right to move about freely and simply walk away from the police encounter. The deputy conceded that when he ordered appellant to return to the vehicle, he did not intend to detain him for investigative questioning; he was merely following his standard traffic stop procedures for safety.

The Fourth Amendment, applicable to the states through the Fourteenth Amendment, *Mapp v. Ohio*, 367 U.S. 643 (1961), has consistently been interpreted as prohibiting routine and arbitrary seizures of innocent citizens. We find that the individual liberty interests at stake here outweigh the generalized safety concerns. There is little or no evidence to support the belief that the typical traffic stop of ordinary citizens gives rise to sudden violence or unruly behavior justifying wholesale seizures of automobile passengers, unsupported by any individualized suspicion. We recognize, of course, that circumstances may arise which give a prudent and cautious officer reasonable grounds for commanding a passenger to return to and remain in a stopped vehicle. *See, e.g., Rogala v. District of Columbia et al.*, 161 F.3d 44 (D.C. Cir. 1998) (detention of passenger during traffic stop, while police officer conducted field sobriety tests upon driver, was not unlawful seizure under Fourth Amendment, where passenger did not seek to leave the scene, and officer merely required passenger to remain in the car, rather than in the street or on the sidewalk, in light of officer's concerns about his safety, passenger's creation of traffic hazard, and passenger's interference with field sobriety test). However, in those situations requiring an officer to direct a passenger to return to and remain in the vehicle, the officer should be able to identify objective circumstances that support the reasonableness of his order and not rely solely on standard routine or police protocol.

For the reasons stated above, we decline to extend our holding in *Borski v. State* to passengers, and hold that a police officer conducting a lawful traffic stop may not, as a matter of course, order a passenger who has left the stopped vehicle to return to and remain in the vehicle until completion of the stop. The officer must have an articulable founded suspicion of criminal activity or a reasonable belief that the passenger poses a threat to the safety of the officer, himself, or others before ordering the passenger to return to and remain in the vehicle.

Because we find that the evidence in this case was seized as the result of an unlawful detention of the appellant, we reverse the order of the trial court denying his motion to suppress physical evidence.

REVERSED and REMANDED.

GROSS, J., concurs.

SCHACK, LARRY, Associate Judge, concurs specially with opinion.

SCHACK, LARRY, Associate Judge, concurring specially.

I agree with the analysis and conclusion reached in Judge Taylor's well-reasoned opinion. I write only to make it clear that the use of the words "innocent passenger," "blameless passenger" and "innocent citizens" mean someone who, at the time of the law enforcement encounter, is not suspected of any violation of the law, and who does not pose an articulable suspicion of danger to officer safety.

NOT FINAL UNTIL THE DISPOSITION OF ANY TIMELY FILED MOTION FOR REHEARING.

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA.

CRIMINAL DIVISION

CASE NO.97-7412 CFA02

JEFF WILSON,

Defendant/Appellant,

v.

STATE OF FLORIDA,

Plaintiff/Appellee.

ORDER DENYING MOTION TO SUPPRESS

THIS CAUSE came before the court upon Defendant's Motion to Suppress Physical Evidence dated April 16, 1998 and the Court having considered the same and being otherwise advised in the premises, it is hereby

ORDERED AND ADJUDGED that said Motion be and the same is hereby **denied.**

DONE AND ORDERED, in Chambers, in Palm Beach County, Florida this 23 day of July, 1998.

MARVIN U. MOUNTS, JR.
Circuit Court Judge

Copies furnished:

-State Attorney-
-Asst. Public Defender Mallorye Cunningham-
-McIntire, Esq.-
-Jeff Wilson - Defendant